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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-311

RODNEY D. DRIVER, ET AL.,

Petitioners,

v.

RICHARD HELMS, ET AL.,

Respondents.

BRIEF IN OPPOSITION

Of Counsel:
COLE AND
GRONER, P.C.

WALTER H. FLEISCHER
ALFRED F. BELCUORE
1730 K Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent
Richard Ober

Of Counsel:
SCHWALB &
DONNENFELD

CHARLES R. DONNENFELD
1828 L Street, N.W.
Washington, D.C. 20036

Of Counsel:
GUNNING, LA FAZIA
& GNYS, INC.

GUY J. WELLS
419 Turks Head Building
Providence, Rhode Island 02903

Attorneys for Respondent
Richard Helms

(Additional Counsel Listed Inside Front Cover)

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BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the Court of Appeals (Pet. App. 1a-20a) is reported at 577 F.2d 147. The Opinion of the District Court (Pet. App. 21a-69a) is reported at 74 F.R.D. 382.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether 28 U.S.C. § 1391(e), although phrased to cover only certain suits against a Federal official who "is . . . acting in his official capacity or under color of legal authority," provides nationwide personal jurisdiction and venue in suits against former officials or officials who no longer serve in the capacity in which they performed the acts upon which their alleged liability is based, merely because they formerly "were" acting in such a capacity.

Should certiorari be granted, Respondents would present certain additional questions; these are stated in the conditional cross-petition for a writ of certiorari filed *sub nom. Helms, et al. v. Driver, et al.*, No. 78-310.

COUNTERSTATEMENT OF THE CASE

This suit was instituted in the United States District Court for the District of Rhode Island by several individuals, complaining that their international mail had been opened during the period from 1953 to 1973, in a mail interception program operated by the Central Intelligence Agency. Alleging Federal jurisdiction pursuant to 5 U.S.C. § 702 and 28 U.S.C. §§ 1331(a), 1339, 1343, and 1361, Plaintiffs sued approximately 30 individuals who are, or at various times in the last 20 years were, officials of the Post Office Department, the Central Intelligence Agency, the Department of Justice, or other agencies of the Executive Branch. The essential claim of Plaintiffs is that the mail interception program violated their rights under the First, Fourth, Fifth, and Ninth Amendments. The suit purports to be brought against the individuals in their individual, as well as official or former official, capacities. Plaintiffs demand money damages from these Defendants personally, totaling several billion dollars.

Defendants moved to dismiss on the grounds, primarily, of lack of personal jurisdiction and proper venue, relying upon their essential lack of any personal contacts with the forum State, Rhode Island.[1] The District Court denied Defendants' motions, on the ground that 28 U.S.C. § 1391(e) provided for nationwide jurisdiction, venue, and service of process over all Federal officials, past and present, for actions arising out of their Government service, in-

[1] One Defendant did not so move, because he was a resident of Rhode Island. Other Defendants moved to dismiss on grounds of lack of service of process.

cluding actions brought against them in their individual capacities. 74 F.R.D. 382 (D.R.I. 1977).

On an interlocutory appeal certified by the District Court pursuant to 28 U.S.C. § 1292(b), the Court of Appeals for the First Circuit ruled that, although § 1391(e) provides personal jurisdiction over present Federal officials sued for damages in their individual capacities, irrespective of their lack of contacts with the forum State, it does not so provide jurisdiction over former officials or officials who at the time the suit was brought were not serving the Government in the capacity in which they performed the acts upon which their alleged liability is based. 577 F.2d 147 (1st Cir. 1978).

This Brief in Opposition is filed on behalf of Defendants who at the time this action was brought no longer were employed by the Federal Government, or no longer were employed in the capacity in which they performed the acts upon which their alleged liability is based.[2]

REASONS FOR DENYING THE WRIT

Insofar as it holds that former employees of the Government and employees who no longer serve the Government in the capacity in which they allegedly took the actions that are the subject of the Complaint are not amenable to damage suits throughout the Nation under 28 U.S.C. § 1391(e), the decision below is clearly correct. There is no conflict among the Circuits on this issue, and no occasion for further review.

1. Petitioners do not respond to the holding of the Court of Appeals that their efforts to sue Respondents

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[2] Richard Helms, James R. Schlesinger, Robert E. Cushman, Jr., William F. Raborn, Jr., Rufus L. Taylor, Richard M. Bissell, Jr., Cord Meyer, Thomas Karamessines, Richard Ober, William Hood, James Murphy, Howard J. Osborn, Winton M. Blount, Elmer T. Klassen, L. Patrick Gray, Lawrence F. O'Brien, James J. Angleton, and Ray Rocca.

in Rhode Island are incompatible with the express terms of 28 U.S.C. § 1391(e). That provision covers only civil actions in which a defendant officer "*is . . . acting* in his official capacity or under color of legal authority . . ." (emphasis added). Petitioners' position that § 1391(e) encompasses suits alleging that an officer "*was* . . . acting" in his official capacity or under color of legal authority cannot be squared with the literal words of the statute.[3]

Nor do Petitioners point to any legislative history supporting their position.

2. Primarily Petitioners contend that the Court should read § 1391(e) to serve what they deem to be its "liberal purpose" (Pet. 9), *viz.*, to make it easier for citizens to recover damages for alleged constitutional violations. It is improper to "construe" a statute to provide jurisdiction over a broad class of defendants that it does not in terms cover, based upon nothing more than such an alleged general "policy." *E.g., Califano v. Sanders*, 430 U.S. 99, 104-07 (1977). Nor is there evidence that Congress did or would view a draconian measure subjecting every former Federal official to personal damage suits in every Federal court from Guam to the Virgin Islands as serving

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[3] As appears from the conditional cross-petition for a writ of certiorari, filed by many of the Respondents, in No. 78-310, *Helms, et al. v. Driver, et al.*, Respondents consider that 28 U.S.C. § 1391(e) does not apply at all to damage suits aimed at obtaining damages from an officer in his individual capacity. The words "is . . . acting" most naturally are read to encompass civil actions that seek to require an official to respond to a remedy in the nature of mandamus or injunction, or to obtain judicial review of action of an administrative agency, or to cause the *Government* to pay out money. Some such actions, "in essence against the United States," are "nominally brought against the official in his individual capacity" "only to circumvent what remains of the doctrine of sovereign immunity." H. Rep. No. 536, 87th Cong. 1st Sess. 4 (1962), *quoted in* the First Circuit's Opinion, 577 F.2d at 154 (Pet. App. 13a). Suits such as this, seeking substantial money damages personally from an officer, are neither "in essence" against the United States nor "nominally" brought against the officer in his individual capacity.

a "liberal" purpose. Unquestionably, Petitioners are mistaken in contending that the 1962 enactment that included § 1391(e) was designed to provide expansive jurisdiction over "constitutional tort" suits like this one. The availability of the Federal courts as a forum for such suits was not established until *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), 9 years later. *Compare Wheeldin v. Wheeler*, 373 U.S. 647, 649-52 (1963).

3. Contrary to Petitioners' views, there is no conflict between the decision below and *Briggs v. Goodwin*, 569 F.2d 1 (D.C. Cir. 1977), *petition for cert. filed sub nom. Stafford v. Briggs*, 46 U.S.L.W. 3694 (U.S. April 28, 1978) (No. 77-1546). The District of Columbia Circuit did not purport to decide in *Briggs* whether "former" Government employees are within the ken of § 1391(e). There is no reason to anticipate that that Court, if directly confronted with the issue, would disagree with the First Circuit that the provision does not apply to "former" or "different capacity" officials. Nor should this Court undertake to review the issue unless and until there is clear disagreement on the point.

4. Other considerations make review at this time inappropriate. At this time four of the five named Plaintiffs have successfully sued the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), upon the very allegations of mail interception that form the basis of the present Complaint.[4] The Court of Appeals for the Second Circuit has under submission the question of whether such a Tort Claims suit can be maintained. *Birnbaum v. United States*, 436 F.Supp. 967 (E.D.N.Y.), *appeal docketed*, No. 77-6175, 2d Cir., Oct. 17, 1977. Should it be determined

[4] *See Wilson v. United States*, No. 77-C-975 (E.D.N.Y. Feb. 17, 1978) (Petitioner Victoria Wilson); *Driver v. United States*, No. 77-C-919 (E.D.N.Y. Feb. 17, 1978) (Petitioner Rodney D. Driver); *Avery v. United States*, 434 F.Supp. 937 (D. Conn. 1977) (Petitioner Michael Avery); *Birnbaum v. United States*, 436 F.Supp. 967 (E.D.N.Y.), *appeal docketed*, No. 77-6175, 2d Cir., Oct. 17, 1977 (Petitioner B. Leonard Avery).

that such suits are maintainable against the United States, even the questionable "policy" arguments of Petitioners would lose whatever little force they may now have.[5]

This litigation stands in an interlocutory posture. Should it not be resolved as a result of the pending Federal Tort Claims Act litigation, or should a genuine conflict among the Circuits arise, then any party dissatisfied by a final judgment again may seek to bring the issues here presented before this Court, through a petition filed after the final disposition of the case on the merits by the Court of Appeals.[6]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari filed by Petitioners Rodney D. Driver, *et al.*, should be denied.

Respectfully submitted,

Of Counsel:
COLE AND
GRONER, P.C.

WALTER H. FLEISCHER
ALFRED F. BELCUORE
1730 K Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent
Richard Ober

Of Counsel:
SCHWALB &
DONNENFELD

CHARLES R. DONNENFELD
1828 L Street, N.W.
Washington, D.C. 20036

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[5] Moreover, if they ultimately recover judgments for money damages against the United States in the Federal Tort Claims Act cases, the named Plaintiffs would thereby be barred by 28 U.S.C. § 2676 from maintaining this suit. It is unclear that their class action allegations could save this as a viable suit. *See East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Franks v. Bowman Transportation, Co.*, 424 U.S. 747, 753 (1976); *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 129 (1975). The District Court, in its Opinion denying Respondents' motions to dismiss, also ruled that it would certify this suit as a class action as to liability (Pet. App. 54a-69a); however, no Order to that effect has been entered.

[6] *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916).

Of Counsel:
GUNNING, LA FAZIA
& GNYS, INC.

GUY J. WELLS
419 Turks Head Building
Providence, Rhode Island 02903

Attorneys for Respondent
Richard Helms

Of Counsel:
CADWALADER,
WICKERSHAM
& TAFT

PETER MEGARGEE BROWN
EARL H. NEMSER
One Wall Street
New York, New York 10005

Of Counsel:
HINCKLEY, ALLEN,
SALISBURY &
PARSONS

GEORGE M. VETTER, JR.
2200 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for Respondents
James R. Schlesinger,
Robert E. Cushman, Jr.

Of Counsel:
SWAN, JENCKES,
ASQUITH & DAVIS

HARRY W. ASQUITH
EDWARD W. MOSES
911 Turks Head Building
Providence, Rhode Island 02903

Attorneys for Respondents
William F. Raborn, Jr., Rufus L.
Taylor, Richard M. Bissell, Jr.,
Cord Meyer, Thomas Karamessines,
James R. Murphy, William J. Hood

Of Counsel:
HIGGINS, CAVANAGH
& COONEY

JOSEPH V. CAVANAGH
600 Turks Head Building
Providence, Rhode Island 02903

Attorney for Respondents
Howard J. Osborn, Winton M.
Blount, Elmer T. Klassen,
L. Patrick Gray, Lawrence F.
O'Brien

Of Counsel:
BREED, ABBOTT
& MORGAN

JOSEPH P. DAILEY
One Chase Manhattan Plaza
New York, New York 10005

Attorney for Respondent
Lawrence F. O'Brien

Of Counsel:
DUNCAN, BROWN,
WEINBERG & PALMER,
P.C.

JON T. BROWN
WALLACE L. DUNCAN
PHILIP L. CHABOT, JR.

Attorneys for Respondents
James J. Angleton
Ray Rocca